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No. 83-979

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD LORRIN CRONN,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES A FEDERAL CRIMINAL DEFENDANT, WHO IS A WHITE MALE, HAVE STANDING TO CHALLENGE THE PURPOSEFUL, DISCRIMINATORY EXCLUSION OF BLACKS, WOMEN AND HISPANICS FROM THE POSITION OF GRAND JURY FOREMAN?

II.

IS INVIDIOUS DISCRIMINATION IN THE SELECTION OF FEDERAL GRAND JURY FOREMEN A SIGNIFICANT VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRING DISMISSAL OF AN INDICTMENT?

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TO THE HONORABLE COURT:

COMES NOW the Petitioner, DONALD LORRIN CRONN, who offers this Reply Brief in Support of Petition for Writ of Certiorari and would show the Court as follows:

ARGUMENT

In its brief filed with this Court, the Government urges that Petitioner's request for review be denied because the court of appeals' decision below was correct in rejecting standing for Petitioner to challenge the discriminatory selection of federal

grand jury foremen and because the decision was not in conflict with the decision of any other circuit. However, contrary to the Government's contentions and the court of appeals' decision, Petitioner presented a due process claim under the Fifth Amendment which he had standing to assert under this Court's holding in *Peters v. Kiff*, 407 U.S. 493 (1972). Further, regardless of the nature of the claim, the denial of standing by the court below is in conflict with the decisions of the Eleventh Circuit in *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982), *United States v. Holman*, 680 F.2d 1340 (11th Cir. 1983), and *United States v. Cross*, 708 F.2d 631 (11th Cir. 1983).

I.

NATURE OF PETITIONER'S CLAIM

The Petitioner's claim and standing to raise it are based upon due process grounds, despite the court of appeals' holding that *only* an equal protection claim was raised. The nature of Petitioner's claim is demonstrated by his reliance upon *Peters v. Kiff*, 407 U.S. 493 (1972), the *one time* that the issue of standing was raised. (Pet.App. 47A.) Further proof that Petitioner relied upon due process, and not simply equal protection, is found in the district court's opinion explicitly finding that Petitioner had standing under *Peters v. Kiff*. (Pet.App. 31A-33A.)

The most compelling proof that Petitioner's claims were adequately based upon due process is provided by a comparison of this case with *Hobby v. United States*, No. 82-2140, in which this Court granted certiorari on December 12, 1983, and *United States v. Cross*, No. 83-1037, in which the Government filed a petition for writ of certiorari to the Eleventh Circuit. In acquiescing to the grant of certiorari in *Hobby*, the Goverment noted that at the district court level Hobby had stated his claim in terms of "'discrimination' (presumably in violation of the equal protection component of the Due Process Clause)."

(Hobby Br. 5 n.2.) The Government also went on to state: "On appeal, defendants' claim rested exclusively upon alleged underrepresentation of blacks and women among forepersons, and was predicated entirely upon an equal protection theory [cite omitted]." (Hobby Br. 6 n.2 cont.) This claim was supported by citation only of *Duren v. Missouri*, 439 U.S. 357 (1979), *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Peters v. Kiff*, 407 U.S. 493 (1972). (*Id.*)

Likewise in *Cross*, the Government noted that Cross' attack on his indictment was not clear as to whether it was based upon due process, equal protection or both. According to the Government's petition in *Cross*, "Respondent claimed the underrepresentation of blacks and women in the position of foreperson reflected a 'constitutional violation of [his] Fifth Amendment due process rights' [cite omitted]." (Cross Pet. 4.) The only clarification of Cross' claim apparently was his citation of *Peters v. Kiff*, 407 U.S. 493 (1972) and *Duren v. Missouri*, 439 U.S. 357 (1979). (Cross Pet. 4 n.6.)

The due process nature of Petitioner's claim as the basis of his standing is at least as clear as that in *Hobby* and *Cross*. The claims of Hobby and Cross, which were sufficiently based upon due process to provide them with standing, also clearly demonstrate that the Petitioner's claim was more than adequate to invoke the protections of the Due Process Clause. The Government in its opposition brief seeks unsuccessfully to distinguish *Hobby* and *Cross* on the ground that those defendants apparently relied at least in part on a due process theory. (Br. 10 n.2.) It also claims that Petitioner's reliance upon *Peters v. Kiff* for standing does not in any way show that he was making a due process challenge as well as one involving equal protection issues. (Br. 11 n.3.) However, the reliance upon *Peters v. Kiff* by Hobby and Cross was enough, particularly in *Hobby*, to prove that a due process challenge was involved rather than solely an equal protection challenge.

The court of appeals' finding that Petitioner had no standing because of his failure to specifically invoke the magic words, "due process," is manifestly erroneous. Standing was not challenged by the Government at any point during the proceedings. The only time that the district court raised the standing question, Petitioner explicitly relied upon *Peters v. Kiff*, (Pet.App. 47A.)* The district court understood Petitioner's arguments in context and appropriately accorded him standing under *Peters*, (Pet.App. 33A), as the court of appeals should have.

Whether Petitioner's challenge to his indictment involved due process and not just an equal protection analysis is, contrary to the Government's contention, a matter of general importance. As can be seen from *Hobby* and *Cross*, the question of the specificity of a defendant's attack on the selection of foremen has not just occurred in Petitioner's case. Assuming that this Court accepts the petitioner's arguments in *Hobby* and the holdings of the Eleventh Circuit concerning the significance of the discriminatory selection of grand jury foremen, as Petitioner urges this Court to do, (Pet. 14-22), the procedures and standing to make such challenges should also be set out by this Court. Petitioner's case raises the specific issue not directly involved in *Hobby* or *Cross*, that is, what allegations are sufficient to give a defendant standing to make a grand jury foreman attack. This case allows the Court to explicitly resolve the standing question along with the substantive issues from *Hobby*.

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*This citation to *Peters v. Kiff* as the basis for standing was not discussed by the court of appeals at all, thus calling into question the court's statement that "the due process attack sanctioned by *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), lay ready to Cronn's hand but was not taken up." (Pet.App. 24A.)

II.

CONFLICT AMONG THE CIRCUITS

No matter what the characterization of Petitioner's claim, whether due process or equal protection, the decision by the court of appeals still created a conflict with *Perez-Hernandez*, *Holman* and *Cross* from the Eleventh Circuit. Assuming *arguendo* that the Fifth Circuit was correct in finding that Petitioner made only an equal protection claim, the denial of standing to Petitioner is directly contrary to the holdings of the Eleventh Circuit. The conflict is plain and was recognized by the Fifth Circuit in reaching its decision. (Pet.App. 9A.) As the Government admits in its brief, (Br. 8-9), in *Perez-Hernandez* the Eleventh Circuit held that a Hispanic male had standing to raise an equal protection challenge to the exclusion of blacks and women as grand jury foremen. This holding was followed in both *Holman* and *Cross*. In this case the Fifth Circuit denied Petitioner standing to bring an equal protection claim because he was not a member of the excluded groups. A more direct conflict would be difficult to imagine regardless of whether the Eleventh Circuit has discussed the specific difference, if any, between an equal protection attack on the selection of grand jury foremen and one based upon due process.

Because Petitioner's motion to dismiss was also based upon due process, the Fifth Circuit's refusal to recognize that fact also created a conflict with not only the Eleventh Circuit, but also with the Fourth Circuit's decision in *United States v. Hobby*, 702 F.2d 466 (4th Cir. 1983), *cert. granted*, No. 82-2140 (Dec. 12, 1983). As demonstrated, *supra* at pp. 2-3, the defendant's claims in *Hobby* and *Cross* were almost identical to that made by Petitioner. Thus, the denial of standing to Petitioner conflicts with the assessment of the same facts by the Fourth and Eleventh Circuits. In particular *Cross* is in conflict because standing was put in issue there, and the court of appeals held that the defendant had properly invoked standing under *Peters*

v. Kiff, a case involving due process. Because Petitioner's claim and that of *Cross* are almost identical, the failure of the Fifth Circuit to accord standing to Petitioner, at the very least created a direct, irreconcilable conflict with *Cross* and the Eleventh Circuit which should be resolved.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Petitioner, DONALD LORRIN CRONN, prays that this Court grant his petition for certiorari, or, alternatively, at a minimum, hold the petition until the disposition of *Hobby v. United States*, No. 82-2140.

Respectfully submitted,

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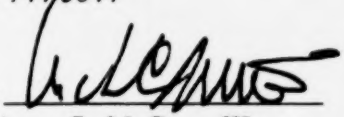
BY: 

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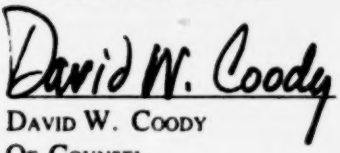

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